In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 656

ROSCOE L. NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–48a) is reported at 392 F. 2d 255.

JURISDICTION

The decision of the Court of Claims was rendered on March 15, 1968. A timely motion for a new trial was denied on July 17, 1968. The petition for a writ of certiorari was filed on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether Section 10 of P.L. 86–616 violates the due process clause of the Fifth Amendment by permitting the Secretary of the Air Force to retire offi-

cers under a personnel reduction program without affording them a trial-type hearing.

2. Whether the Court of Claims correctly held that the merits of petitioners' discharge were not subject to judicial review.

3. Whether Section 10 of P.L. 86–616 constitutes an unconstitutional delegation of power and whether the Secretary's redelegation of power is lawful.

STATUTE INVOLVED

P.L. 86–616, 74 Stat. 386, 395, July 12, 1960, provides in pertinent part:

* * * * *

> Sec. 10. (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers of the Regular Army or the Regular Air Force, as the case may be, in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers of that component on the active list in the regular grade of colonel or lieutenant colonel who have at least 20 years of service computed under section 3927(a) or 8927(a) of title 10, United States Code, whichever applies, and who have been considered more than twice but not recommended for promotion to the next higher regular grade.
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> (b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers.

However, except with respect to the first board convened under this section in the Army and in the Air Force, the number specified by him for officers in any category must be at least 80 percent of the officers in that category being considered. An officer may be considered for continuation on the active list under this section only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.

(c) Except as provided by section 1 of the Act of April 23, 1930, ch. 209, as amended (5 U.S.C. 47a), if the Secretary approves the report of a board, he shall, not later than the first day of the seventh calendar month beginning after he approves that report, retire each officer who is considered but not recommended for continuation.

(d) A member of the Army or the Air Force who is retired under this section is entitled to retired pay computed under formula A of section 3991 or 8991, respectively, of title 10.

(e) This section does not apply to—

(1) members of the Army Nurse Corps, Army Medical Specialist Corps, or Women's Army Corps;

(2) Air Force nurses or medical specialists; or

(3) female members of the Air Force who are not designated under section 8067 (a)–(d) or (g)–(i) of title 10.

(f) This section is not effective after June 30, 1965.

STATEMENT

As a result of the expansion of the military forces subsequent to World War II, a number of officers, particularly in the Air Force, were promoted rapidly to the grades of Colonel and Lieutenant Colonel. Many of those officers had limited prospects for further promotion. Hearings, Subcommittee of the Senate Armed Services Committee on S. 1795, 86th Cong., 1st Sess., pp. 38–39. Officials in the Defense Department became concerned about the relative ability of such officers who could expect to continue on active duty without further promotion until the completion of from 28 to 30 years of service.[1] S. Rep. No. 571, 86th Cong., 1st Sess., p. 3.

In 1960 Congress, at the request of the Secretary of Defense and after hearings before Committees of both houses, enacted Section 10 of P.L. 86–616, 74 Stat. at 395. Under that section, the Secretaries of the Army and the Air Force were authorized to convene Boards "[n]ot more than once each fiscal year" for the purpose of recommending "for continuation on the active list" of officers of the rank of colonel and lieutenant colonel those who had served at least 20 years and who "[had] been considered more than twice but not recommended for promotion." The Act further provides that if the Secretary approves the report of the Board, he "shall retire each officer who is considered but not recommended for continuation." By its own terms, the statute "is not effective after June 30, 1965" (Section 10f), 74 Stat. 395.

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[1] 10 U.S.C. 8916 and 8921.

Petitioners are former Air Force officers who were retired under P.L. 86–616 on the recommendations of Selection Boards convened in 1961 and 1963 (Pet. App. 39a–48a). In each case, the officer was found by the Board to have a rating below the average officer under consideration (Pet. App. 17a, 46a–47a). Petitioners instituted this suit in the Court of Claims, asserting that their separation from the Air Force was improper. They sought to recover the difference between their retirement pay and the pay they would have received had they served until the completion of the maximum terms permitted under law (Pet. App. 2a).

The Court of Claims dismissed their petitions (Pet. App. 1a–48a; 392 F. 2d 255). The court found that the Secretary of the Air Force had fully complied with the requirements of the statute in effecting petitioners' removal. The court held that in view of the nature of the removal program and petitioners' status as servicemen, the statute did not unconstitutionally impair any "vested" rights, nor did it unlawfully delegate legislative authority to the Secretary.

ARGUMENT

1. Petitioners' primary attack on the statute is that Congress cannot constitutionally provide for the removal of military personnel under a provision such as Section 10, P.L. 86–616, without affording the persons affected a trial-type hearing (Pet. 6–8). In *Reaves* v. *Ainsworth,* 219 U.S. 296, 304, this Court rejected the contention that the absence of full trial-

type proceedings in a military discharge case violated due process, and stated (*ibid.*):

> What is due process of law must be determined by circumstances. To those in the military or naval services of the United States, the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.

Accord, *Creary* v. *Weeks,* 259 U.S. 336, 343.

Surely, in the context of the personnel requirements of the armed services, Congress can provide for a summary method of reducing forces where such action is found to be in the national interest. *Creary* v. *Weeks, supra,* 259 U.S. at 343.[2] Indeed, this Court has recognized that, even with respect to civilians, "government employment, in the absence of legislation, can be revoked at the will of the appointing officers." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896.

Petitioners had no "vested" right to remain on duty 28 to 30 years. Under 10 U.S.C. 8916 and 8921 (upon which they rely), the statutory terms of service apply "Unless [an officer is] retired or separated at an earlier date * * *." Since both provisions on their

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[2] It should be noted that here the separation does not carry with it the stigma of a finding that the officer has not performed his duties satisfactorily. By contrast, under Section 7(a) of P.L. 86-616 (now 10 U.S.C. 8781-8787), which was *not* utilized in this case, provision is made for removal of an officer whose "performance of duty has fallen below standards prescribed by the Secretary", and the officer is afforded a show-cause hearing under that provision, with formal charges and trial-type proceedings.

face specify the maximum service permitted before retirement is mandatory, these provisions do not purport to confer vested rights upon officers to remain on duty for the extended periods. But even assuming that petitioners' rights had to some degree become vested, the sovereign has the power to modify such rights in cases involving the manpower needs of the armed forces. Compare *Norman* v. *B. & O. R. Co.*, 294 U.S. 240; *Louisville and Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467; *El Paso* v. *Simmons*, 379 U.S. 497, 508; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91. See also *Lynch* v. *United States*, 292 U.S. 571, 579.

2. It is also clear that the merits of the military decision to reduce the number of officers is beyond the province of the courts. *Reaves* v. *Ainsworth*, *supra*, 219 U.S. at 304; *Creary* v. *Weeks*, *supra*, 259 U.S. at 344; *French* v. *Weeks*, 259 U.S. 326, 335; *Payson* v. *Franke*, 282 F. 2d 851 (C.A.D.C.), certiorari denied, 365 U.S. 815. See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94. The Court of Claims, therefore, correctly declined to substitute its judgment for that of the Secretary of the Air Force with regard to the wisdom of retiring the petitioners under the Act.

3. There is no merit to petitioners' contention that the statute is unconstitutional because it fails to prescribe adequate standards for the Secretary in implementing its mandate. The statute on its face outlines clear guidelines for selection of officers for retirement: (1) they must have served at least 20 years and (2) have failed of promotion after being con-

sidered at least three times. Moreover, with the exception of the first Board of Selection, the Boards were required to recommend for continuation at least 80 per cent of the officers considered, thus permitting removal of a maximum of only 20 per cent considered. In light of the legislative history of the Act, these standards give an entirely reasonable basis for administrative action. See *Fahey* v. *Mallonnee*, 332 U.S. 245, 250.

The Secretary acted properly in delegating his authority to convene the Boards to his Deputy Chief of Staff for Personnel. Unlike the situation in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (relied upon by petitioners), there is no showing here that Congress specifically considered whether this particular power could be delegated and determined that it could not. 315 U.S. at 366; see also *Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442, 444 (C.A. 5). In the present case the court below correctly pointed out that the matter of personnel reduction was reasonably placed in the hands of the Deputy Chief of Staff in charge of personnel, who acted by order of and in the name of the Secretary (Pet. App. 13a, 35a). Cf. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 120–122.[3]

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[3] Finally, petitioners' contention that Congress was misled by the Air Force into passing the statute is incorrect and in any event irrelevant. The House Report on the Bill (H. Rep. No. 1406, 86th Cong., 2d Sess., p. 11) makes it perfectly clear that Congress expected the retirement of about "200 colonels and about 500 lieutenant colonels" during the life of the statute. Moreover, the limitation actually placed in the statute was that 80 per cent of the officers considered (after the first Board)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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should be retained. Congress was free to place any other limitation in the statute, and did not choose to do so.

Petitioners' contentions about alleged minor mistakes in the Court of Claims' opinion are wholly irrelevant since no prejudice of any kind is asserted or shown in that connection.

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